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No. 10- 10-782

IN THE

Supreme Court of the United States

ROSENDO BENITO RANGEL-PEREZ,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER W. HELT, ESQ.
Counsel of Record
THE HELT LAW GROUP, LLC.
1754 West Lunt Avenue
Chicago, Illinois 60626
(888) 739-6794
heltlaw@comcast.net

Counsel for Petitioner

233806

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

1. Whether the circuit courts of appeal are stripped of jurisdiction to review cancellation of removal matters for non-permanent residents under 8 U.S.C. § 1229b(b)(1)(D) decided by the Board of Immigration Appeals?

PARTIES TO THE PROCEEDING

Petitioner is Rosendo Benito Rangel-Perez, the petitioner below. Respondent is United States Attorney General Eric H. Holder, Jr, respondent below.

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OPINIONS BELOW

The opinion of the court of appeals is unreported. The decision of the Board of Immigration Appeals dismissing Petitioner's appeal, and the decision of the immigration judge also is unreported.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for Writ of Certiorari is being filed within ninety days of the above-referenced decision of the Eleventh Circuit Court of Appeals.

STATEMENT OF THE CASE

Rosendo Benito Rangel-Perez, a native and citizen of Mexico, entered the United States in May of 1997 and has remained permanently in the United States ever since. He is married to a United States citizen, Anna Roque and has a United States citizen step-son, Maury Roque. His wife owned and operated a grocery store, La Mexicana, which sold over the counter medications. *See Appendix C.* In 2008, Rangel-Perez was convicted of a "regulatory offense related to the sale of prescription drugs." *See Appendix C.* Specifically, petitioner was convicted in the State of Florida for the delivery of drugs without a prescription, and sale of contraband. *Id.* The federal government then detained him and placed him in removal proceedings on the basis of his unlawful entry into the United States. On September 19, 2007, he government sought his removal under 8 USC § 1182 (a)(6)(A)(i) (present without being

admitted or paroled), 8 USC § 1182 (a)(7)(a)(i)(I) (Immigrant-no valid visa or entry document), then amending the charges in May 2008, additionally for having been convicted of a crime involving moral turpitude, and for having been convicted of a crime involving a controlled substance.

At his removal hearing at the Krome Detention Center in Miami, Florida, Perez-Rangel conceded the factual allegations for 237(a)(2)(B)(i) and sought cancellation of removal under INA removal under INA § 240(A)(b). A grant of this relief by the immigration judge would result in lawful permanent residency to him. To qualify for cancellation of removal for non-permanent residents, an alien must demonstrate: (1) that he has been physically present in the United States continuously for a period of not less than ten years; (2) has been a person of good moral character; has not been convicted of certain offenses; and (3) can establish that his removal would result in exceptional and extremely unusual hardship to his spouse, parent or child who is a citizen or resident of the United States. *See Immigration Judge's opinion and order, Appendix C.*

Rangel-Perez testified at his removal hearing that while he had been formally married his wife for 3 years, they have lived together and man and wife for much longer and had raised his wife's biological son as his own son since the age of 4. *Id.* Rangel-Perez, his wife and step-son all testified that Rangel-Perez cared for his wife over the course of many years for many serious afflictions and medical procedures, including assisting with his wife's bouts with depression, her obesity, gastric bypass surgery and ovarian cancer. The immigration judge

found him statutorily eligible for cancellation of removal for certain non-permanent residents, found he was not removable as an alien convicted of a crime involving moral turpitude or one convicted of using a controlled substance, and ordered him released on bond that same day. The immigration judge later issued a written decision entering a removal order against him on October 21, 2008 and denying his request for cancellation of removal, as a matter of discretion, *inter alia*. *Id.*

Rangel-Perez appealed the opinion and order to the Board of Immigration Appeals. Rangel-Perez argued that he was entitled to cancellation of removal, and raised a number of statutory and constitutional arguments. The BIA affirmed the immigration judge's decision and dismissed Rangel-Perez's appeal on July 22, 2009. Petitioner then filed a timely petition for review with the Eleventh Circuit Court of Appeals.

On September 10, 2010, the Eleventh Circuit Court of Appeals denied petitioner's petition for review. In doing so, the court relied on the invocation of jurisdictional bars under 8 U.S.C. § 1228b, which were acknowledged by the petitioner, but petitioner argued did not apply in all cases wherein a circuit court reviews matters involving denials of discretionary relief in immigration proceedings. Petitioner further submitted that the Eleventh Circuit Court nevertheless retained jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review constitutional claims and questions of law. Petitioner further argued that the BIA applied the wrong legal standard and it erred as a matter of law by failing to examine the "cumulative hardship" visited upon the

petitioner, much more than the weight the BIA assigned to his evidence. These issues were never addressed, however, because the Eleventh Circuit invoked the jurisdictional bar to hearing these issues. In failing to review, on the merits, the request by petitioner to apply the appropriate law in his BIA appeal and rule that the BIA in fact erred in failing to follow its own precedent set forth in *In re O-J-O-*, 21 I & N Dec. 381 (BIA 1996), the court held it could not did consider what petitioner felt was critical chronological and legal issues which supported petitioner's petition for review. The Eleventh Circuit finally held that petitioner posited an unreviewable "abuse of discretion argument" finding petitioner was requesting the court to "reevaluate the evidence presented to the IJ about his wife's depressive condition, and to review whether the BIA's hardship was correct in light of that evidence." *See Eleventh Circuit Court opinion, September 10, 2010.*

In upholding the BIA's decision, the Eleventh Circuit Court also cited the BIA's brief reference to the petitioner spouse's health problems finding BIA decision "was not utterly lacking in evidentiary support." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT DID NOT FOLLOW OTHER CIRCUITS COURTS OF CONTROLLING AUTHORITY TO BE ACCORDED CANCELLATION OF REMOVAL MATTERS IN IMMIGRATION PROCEEDINGS

A. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANTACE BECAUSE IT HAS FAR REACHING IMPLICATIONS FOR ALL IMMIGRANTS UNDER THE ELEVENTH CIRCUIT'S JURISDICTION AND IT IS RECURRING.

The decision of the Eleventh Circuit court must not stand because that court relied on the government's erroneous conclusion that jurisdiction does not exit in these matters. The Eleventh Circuit Court should not have made such a conclusion, as the BIA must still review the cumulative effect of all evidence submitted in cancellation cases under its own precedent-setting case of *In re O-J-O-*, and the failure to do so permitted the Eleventh Circuit to review said agency's decision to dismiss petitioner's appeal, notwithstanding certain jurisdictional bars cited by the Eleventh Circuit (the Eleventh Circuit relying on *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281 (11th Cir. 2007), for example). The Eleventh Circuit certainly had jurisdiction to render a decision on the merits in this matter as do other courts of appeal nationwide.

Given the issues presented in Rangel-Perez' petition for review, this conclusion does not accurately reflect

the prevailing law in other circuits and the decision sets a dangerous precedent for other immigrants seeking review of cancellation decisions made by the Board of Immigration Appeals within that circuit's jurisdiction[1]. In fact, in nearly every other circuit, an identically situated alien would have an opportunity to obtain cancellation of removal and remain lawfully in the United States. There is no justification for permitting that stark disparity of treatment to continue in the Eleventh Circuit, particularly in view of the Constitution's contemplation of a "uniform Rule of Naturalization." U.S. Const. art. I § 8, cl. 4

Cancellation of removal for nonpermanent residents ("non-LPR cancellation") allows qualifying individuals with no ability to adjust status via family or employment means to obtain permanent residence in the United States by a federal immigration judge. To become eligible for non-LPR cancellation, an applicant must establish, *inter alia*, that his or her removal would cause exceptional and extremely unusual hardship to a qualifying relative. *Matter of Monreal*, 23 I&N Dec. 56, 60 (BIA 2001). The Eleventh Circuit here as it had done in other cases such as *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281 (11th Cir. 2007), the court declined to exercise jurisdiction over many hardship determinations. However, other circuit courts have found that in certain instances, the determination whether an alien has established exceptional and extremely unusual hardship can present a legal question over which the court has

1. The Eleventh Circuit Court of Appeals has jurisdiction over all BIA decisions reviewing all immigration judge decisions made in Alabama, Florida, Georgia North Carolina and South Carolina.

jurisdiction. Therefore, because the Eleventh Circuit refuses to apply this standard there is no uniformity with regard to federal immigration law within this jurisdiction. Again, there is no justification for permitting that stark disparity of treatment with cancellation of removal cases reviewed by the Eleventh Circuit Court of Appeals.

Obtaining non-LPR cancellation by an immigrant in removal proceedings requires an applicant to establish four statutory elements: (A) physical presence in the United States for a continuous period of 10 years; (B) good moral character during that period of time; (C) no convictions for certain criminal offenses; and (D) exceptional and extremely unusual hardship to the applicant's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. § 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The statute states that if these requirements are met, the "Attorney General may cancel removal of . . . an alien who is inadmissible or deportable from the United States." *Id.* There are only three decisions, however, published by the Board of Immigration Appeals to guide that agency in reviewing cancellation cases. *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). In denying the respondent's application for non-LPR cancellation in *Matter of Monreal* (citation *infra*), the BIA determined that the hardship the respondent's children would face if the respondent were removed to Mexico would not rise to the level of exceptional and extremely unusual hardship. The BIA noted that the children were in good health,

that the oldest child could speak, read, write, and understand Spanish, and that they would be reunited with family upon their return. Similarly, in *Matter of Andazola* (citation *infra*), the BIA denied the application of a 30-year-old Mexican single mother of two United States citizen children. In that case, the mother had been in the United States for 16 years, had no family in Mexico, and expressed concerns about discrimination and the limited opportunities she and her children would face if removed. In vacating the decision of the Immigration Judge granting her application, the BIA stated that "the hardships the respondent . . . outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country." *Matter of Andazola*, 23 I&N Dec. at 324. *Matter of Recinas*, 23 I&N Dec. at 470, on the other hand, identified "the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." In finding that a Mexican applicant had shown the requisite level of hardship, the BIA highlighted the fact that the respondent was a 39-year-old single mother of six children, four of whom were United States citizens. In addition, the applicant's family had been in the United States for 14 years, and her entire family, including her siblings, resided lawfully in the United States. *Id.* Moreover, the children spoke little Spanish, the applicant relied heavily upon her family to care for the children while she worked, and no similar support existed in Mexico. The BIA emphasized that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Id.* Thus there are clear ground rules

and guidance to decide these immigration applications by aliens.

B. THE ELEVENTH CIRCUIT HAD JURISDICTION TO REVIEW THE DECISION OF THE BIA.

Petitioner acknowledged before the Eleventh Circuit that § 242(a)(2)(B)(i) of the Act, 8 U.S.C. § 1252(a)(2)(B)(i), that, notwithstanding other provisions of the law, the circuit courts *may not* retain jurisdiction to review "any judgment regarding the granting of relief under" several provisions of the INA, including section 240A, which governs cancellation of removal. Petitioner further acknowledged that § 242(a)(2)(B)(ii) bars circuit courts from reviewing "any other decision or action of the Attorney General . . . the authority for which is specified under this title to be in the discretion of the Attorney General," except for asylum. However, judicial review of legal and constitutional, as opposed to factual determinations, is permitted under § 242(a)(2)(D), which states that no provision of the Act "shall be construed as precluding review of constitutional claims or questions of law." *Id.*

In general, circuit court decisions reviewing the merits of non-LPR cancellation determinations have been rare and clearly the BIA has characterized non-LPR cancellation as a discretionary form of relief from removal. *Matter of Almanza-Arenas*, 24 I&N Dec. 771, 774 (BIA 2009). In addition, petitioner is also aware that every circuit court has held that in at least certain instances, the determination whether an alien has met his or her burden to establish the requisite hardship is considered a discretionary determination outside of a

circuit court's jurisdiction to review. *See, e.g., Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 38-39 (2d Cir. 2008); *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 1222-23 (11th Cir. 2006); *Bencosme de Rodriguez v. Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005); *Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Rueda v. Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Leyva v. Ashcroft*, 380 F.3d 303, 305-06 (7th Cir. 2004); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003).

However, jurisdiction does exist to review certain legal determinations with respect to applications for cancellation of removal, despite the Eleventh Circuit Court's reliance on *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281 (11th Cir. 2007). Other circuits clearly disagree with the Eleventh Circuit's position: *Garcia v. Holder*, 584 F.3d 1288, 1289 n.2 (10th Cir. 2009) (concluding that the alien's conviction for third-degree assault rendered him ineligible for cancellation of removal); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1157 (9th Cir. 2009) (remanding from a determination that the alien's crimes rendered him ineligible for cancellation of removal); *Vasquez-Martinez v. Holder*, 564 F.3d 712, 717-19 (5th Cir. 2009) (holding that the alien's Texas conviction for possession of cocaine with intent to deliver was for an aggravated felony, rendering the alien ineligible for cancellation of removal); *Obi v. Holder*, 558 F.3d 609, 612 (7th Cir. 2009) (holding that INA § 240A(b)(1)(C) is not impermissibly retroactive when applied to a conviction that occurred

prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546); *Mejia-Rodriguez v. Holder*, 558 F.3d 46 (1st Cir. 2009) (finding the alien not eligible for the petty offense exception and therefore ineligible for cancellation of removal); *Augustin v. Att'y Gen.*, 520 F.3d 264 (3d Cir. 2008) (finding that the BIA did not err in refusing to impute the father's years of continuous residence to his son for purposes of establishing the requisite continuous residence for cancellation of removal); *Mbea v. Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007) (finding that the malicious burning of property in violation of the D.C. criminal code is a crime of violence, rendering the alien ineligible for cancellation of removal); *Singh v. Gonzalez*, 451 F.3d 400, 406-07 (6th Cir. 2006) (remanding after the BIA imputed to the minor petitioners certain fraudulent actions of their parents).

Nationwide, circuit courts have found jurisdiction to examine an Immigration Judge's determination whether a qualifying relative will suffer exceptional and extremely unusual hardship if the petitioner is removed. The Eleventh Circuit, therefore, was flatly incorrect. Specifically, other circuit courts have found jurisdiction to examine whether the immigration judge or the BIA either: (1) used an incorrect legal standard in this determination; or (2) misapplied the Board's precedent. In *Mireles v. Gonzales*, 433 F.3d 965 (7th Cir. 2006), the petitioner argued that the immigration judge made a legal error in understanding the meaning of exceptional and extremely unusual hardship. The United States Court of Appeals for the Seventh Circuit determined that it retained jurisdiction to review the petitioner's

argument. *Id.* at 969. In *Gomez-Perez v. Holder*, 569 F.3d 370, 371 (8th Cir. 2009), the petitioner, a native and citizen of Guatemala, argued before the Immigration Court that his removal would result in exceptional and extremely unusual hardship to his United States citizen children. In denying the petitioner's application, the Immigration Judge noted that the hardship to the children would be largely economic, since the petitioner said his children would remain with their mother in this country. On appeal, the petitioner claimed that the Immigration Judge erred by applying an incorrect standard in determining whether his children would suffer exceptional and extremely unusual hardship and argued that the Immigration Judge looked at the children's present circumstances, instead of looking to future hardship. The Eighth Circuit held that whether an Immigration Judge has applied the correct legal standard is *a question of law* within the court's jurisdiction to review. The petitioner also claimed that the Immigration Judge and the Board "applied an incorrect legal standard by failing to adequately consider certain factors [regarding hardship] that have been considered relevant in other BIA decisions." *Id.* at 373.

In *Figueroa v. Mukasey*, 543 F.3d 487, 491-92 (9th Cir. 2008), petitioner asserted that the Immigration Judge misapplied the legal standard in evaluating the hardship for non-LPR cancellation, in that he required petitioners to show hardship that was "unconscionable." The petitioner also argued that the Immigration Judge further erred in only considering the present medical conditions (Attention Deficit Hyperactivity Disorder, depression, ocular disorder, astigmatism) experienced by the petitioner's children and failed to analyze

whether the children would suffer future hardship. In reaching a decision that it retained jurisdiction, the Ninth Circuit looked to the Seventh Circuit's decision in *Mireles v. Gonzales* (citation *supra*), for guidance on whether to assume jurisdiction. The Ninth Circuit also looked to other areas of immigration law where a circuit court has jurisdiction over the analysis of a legal issue, *even when the overarching decision is a discretionary one, as in this matter.* In ruling that it had jurisdiction to review the hardship determination, the Ninth Circuit stated in Figueroa that even if an Immigration Judge's decision is discretionary, it is not outside a court's purview to review the agency's decision *if the agency misapplies the law. Id.* at 495-96 (*citing Hernandez v. Ashcroft*, 345 F.3d 824, 846-47 (9th Cir. 2003) (the BIA "must exercise its discretion within the constraints of the law")). In *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009), the Second Circuit declined to find the hardship determination reviewable as a matter of law but remanded the case to the Board on account of other legal errors. In its decision, that court referenced two prior Second Circuit cases, *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006), and *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005), which described the adjudication of a non-LPR cancellation application as a two-part process. That is, the Immigration Judge must first determine whether an individual is statutorily eligible for the relief and, second, he or she must determine whether the alien merits that relief as an exercise of discretion. In *Rodriguez*, the court found it had jurisdiction to evaluate whether the petitioner had committed certain crimes that would render him ineligible for non-LPR cancellation. The *Mendez* court found that it retained jurisdiction to review the

petitioner's application because the Immigration Judge erred as a matter of law in analyzing his claim. The court found that the Immigration Judge failed to address certain evidence presented by the petitioner, including: (1) the specialized piece of medical equipment the petitioner's United States citizen daughter used; (2) the number of asthma attacks the daughter experienced yearly; (3) the long-term prognoses of the daughter's asthma; (4) the specialized medical doctor the petitioner's son visited annually; (5) the unavailability of a specialized medical doctor for the petitioner's son in Mexico; and (6) the petitioner's ability to pay for highly specialized care in Mexico. The court also found that the Immigration Judge failed to evaluate all the evidence submitted and therefore did not appropriately address whether the petitioner's removal would result in exceptional and extremely unusual hardship to his two United States citizen children. The court stated:

> We readily acknowledge that the agency does not commit an "error of law" every time an item of evidence is not explicitly considered or is described with imperfect accuracy, but where, as here, some facts important to the subtle determination of 'exceptional and extremely unusual hardship' have been totally overlooked other and have been seriously mischaracterized, we conclude that an error of law has occurred.
>
> *Id.* at 323.

That court noted that the immigration judge had not made an adverse credibility finding and stated that it

was "not confident that, after taking the overlooked evidence into account and describing it accurately," the agency would again conclude that the petitioner failed to establish exceptional and extremely unusual hardship. *Id.* Therefore, the court remanded the case to the BIA for a new determination on the question of hardship. In this case, the petitioner cited to a plethora of instances wherein the IJ failed to examine hardship evidence. All examples were also brought to the attention of the Eleventh Circuit which also fell on deaf ears.

In yet another case clearly demonstrating a circuit court's jurisdiction to review cancellation of removal cases, the Sixth Circuit, in *Aburto-Rocha v. Mukasey*, 535 F.3d 500 (6th Cir. 2008), held that it had jurisdiction to review whether the BIA incorrectly applied its own precedent regarding exceptional and extremely unusual hardship. In accepting jurisdiction, the court stated that "the choice by the BIA to disregard its own binding precedent—even when deciding an issue that is within its discretion—is not itself a discretionary decision Congress has excluded from review." *Id.* at 503. The court went on to say that because it did not want to "second guess" how the BIA weighed the evidence, it would only look to whether the Board "reasonably construed and applied its own precedents." *Id.* In this precedent-setting case, the BIA also erroneously concluded that petitioner here "waived appeal" on challenging the adverse creditability finding. Here, while the petitioner clearly demonstrated that he did not waive any issues, the Eleventh Circuit was silent on this issue as well, which petitioner believed was critical to his petition for review. Thus petitioner's testimony

as addressed by the BIA, should have also been addressed by this Eleventh Circuit. The Eleventh Circuit is well aware that, based on its own precedent, "If an alien's testimony is credible, it may be sufficient, without corroboration, to satisfy [his] burden of proof in establishing [his] eligibility for relief from removal." *Todorovic v. Att'y. General*,09-11652 (11th Cir. Sept. 27, 2010), citing *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1276 (11th Cir. 2009). Credibility determinations made by an IJ must rest on substantial evidence. *Id.* at 1276, 1278. The entire issue was side-stepped by invoking jurisdiction bars—bars which do not exist in other circuits. This Court has recently reversed the decision of the circuit court, holding that an alien may seek cancellation of removal and thereby potentially avoid the harsh consequence of mandatory removal in *Carachuri-Rosendo v. Holder*, 09-60 (June 14, 2010). Here, an alien rightfully so should have the right to a review of his BIA decision by the Circuit Court, as can be done in every other circuit. Immigration laws are federal issues and should be uniformly applied regardless of which circuit an alien resides. It is in America's national interest to have a uniform approach to review of cancellation of removal cases and thus the decision of the Eleventh Circuit must not stand.

CONCLUSION

For the above mentioned reasons, we ask the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

CHRISTOPHER W. HELT, ESQ.
Counsel of Record
THE HELT LAW GROUP, LLC.
1754 West Lunt Avenue
Chicago, Illinois 60626
(888) 739-6794
heltlaw@comcast.net

Counsel for Petitioner

December 9, 2010

APPENDIX

APPENDIX A — PETITION FOR REVIEW OF A DECISION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 10, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13934
Non-Argument Calendar

Agency No. A094-809-903

ROSENDO B. RANGEL-PEREZ,

Petitioner,

Versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

Before BARKETT, HULL and MARCUS, Circuit Judges.

PER CURIAM:

Rosendo Benito Rangel-Perez seeks review of the Board of Immigration Appeals' ("BIA") order affirming the Immigration Judge's ("IJ") denial of cancellation of

removal under 8 U.S.C. § 1229b, and ordering him removed. In his petition, Rangel-Perez acknowledged that this Court generally does not have jurisdiction to review the BIA's order denying him cancellation of removal, but contends that we can review the BIA's affirmance of the IJ's order, because it constituted a complete factual error so egregious that it violated Rangel-Perez's right to due process. After careful review, we dismiss the petition.

When examining a petition for review, we "must first consider whether we have subject matter jurisdiction to hear the petition at all." *Resendiz-Alcaraz v. U.S. Att'y Gen.*, 383 F.3d 1262, 1264 (11th Cir. 2004). We review subject matter jurisdiction *de novo*. *Sanchez Jimenez v. U.S. Att'y Gen.*, 492 F. 3d 1223, 1231 (11th Cir. 2007).

Under 8 U.S.C. § 1229b, the Attorney General may cancel the removal of a nonpermanent resident who establishes, *inter alia*, that removal would cause "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D). Notably, section 1252 limits our jurisdiction over denials of discretionary relief in immigration proceedings. *See* 8 U.S.C. § 1252(a)(2)(B). Specifically, "[n]otwithstanding any other provision of law (statutory or nonstatutory) ... no court shall have jurisdiction to review ... any judgment regarding the granting of relief under" 8 U.S.C. § 1229b. *Id.* § 1252(a)(2)(B)(i).

We have held that the "exceptional and extremely unusual hardship determination is a discretionary decision not subject to review." *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 122_ (11th Cir. 2006) (quotation omitted). Notwithstanding this jurisdictional bar, we have held that "§ 1252(a)(2)(B) allows review of substantial constitutional challenges to the [Immigration and Naturalization Act]." *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003). Section 1252(a)(2)(D) also expressly permits us to review "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). However, we lack jurisdiction "over abuse of discretion claims merely couched in constitutional language." *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1284 (11th Cir. 2007).

In this petition, Rangel-Perez contends that the IJ and BIA made a Discretionary decision – that Rangel-Perez's wife and stepson would suffer hardship, but the hardship did not reach the level required for cancellation of removal – based on a completely false assessment of the underlying facts, which constitutes a due process violation. In reaching its decision, however, the BIA pointed out that the record showed that Rangel-Perez's wife had endured health problems, but she was currently in good health and was financially independent. Thus, the BIA's decision was not utterly lacking in evidentiary support.

As a result, Rangel-Perez is effectively asking us to reevaluate the evidence presented to the IJ about his wife's depressive condition, and to review whether the

BIA's hardship decision was correct in light of that evidence. Rangel-Perez's argument is exactly the sort of abuse of discretion argument that we do not have jurisdiction to consider. *See Arias*, 482 F.3d at 1284. Because Rangel-Perez does not raise a colorable constitutional issue, we lack jurisdiction to consider his argument.

PETITION DISMISSED.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS, U.S. DEPARTMENT OF JUSTICE DATED JULY 22, 2009

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
FALLS CHURCH, VIRGINIA 22041

Decision of the Board of Immigration Appeals

File: A094 809 903 – Miami, FL

Date: JUL 22 2009

In re: ROSENDO BENITO RANGEL-PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Christopher W. Helt, Esquire

ON BEHALF OF DHS: Maria M. Lopez-Enriguez
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)]-
Present without being admitted or paroled

Appendix B

212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)-
Immigrant - no valid immigrant visa or entry document

APPLICATION: Cancellation of removal under section 240A(b); voluntary departure

By an order dated October 21, 2008, an Immigration Judge denied the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b).[1] The respondent has filed a timely appeal of that decision. The appeal will be dismissed.

This Board reviews the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. *See* 8 C.F .R. § 1003.1(d)(3)(i); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). We review all other issues, such as whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-, supra; see also Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008).

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1. The respondent filed his application for cancellation of removal after May 11, 2005. *See* Exh. 5; *see also* Exh. 8. As such, his case is governed by the REAL ID Act. *See Matter of Almanza-Arenas*, 24 I&N Dec. 771, 774 (BIA 2009); *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

Appendix B

Although the respondent contests the denial of his application for cancellation of removal under section 240A(b) of the Act, he has not addressed the Immigration Judge's adverse credibility finding.

In view of this failure, we consider the issue to have been waived on appeal.[2] As for the merits of the respondent's application, while his wife and stepchild will suffer some hardship upon his removal, the record does not reflect that it rises to the exceptional and extremely unusual level required for cancellation of removal. *See, e.g.* Tr. at 71-93, 101-05, 108-09, 113-14, 123-24, 126-28, 204-39, 275-347, 352-61, 373-74 (discussing the health problems from which the respondent's wife previously suffered, but acknowledging that she is currently well and financially independent); *see also* Exh. 6; Exh. 9; Exh. 10; Exh. 11. *Cf. Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319, 322 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56, 63-64 (BIA 2001). There is simply no evidence from which we can conclude the hardship the respondent's family would suffer is

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2. The record also reflects that the respondent's testimony regarding his children did conflict with that of his supporting witnesses. *Compare, e.g.*, Tr. at 62-63, 128-32, *with* Tr. at 221-26, 238-39, 309-12, 316-20. These discrepancies were cited by the Immigration Judge and furnished a sound basis for his determination that the respondent is not credible. *See* I.J. at 17; *see also* section 240(c)(4)(C) of the Act. Thus, there is no clear error in the Immigration Judge's factual findings, including his negative credibility determination.

distinguishable from that which would ordinarily be expected. Accordingly, we will affirm the Immigration Judge's decision.

We will now turn to the respondent's apparent request for a remand in order to establish his eligibility for voluntary departure pursuant to section 240B(b) of the Act, 8 U.S.C. § 1229c(b). Given the facts of this case, we conclude that there is no cause to remand the matter in order to afford the respondent an opportunity to seek this discretionary form of relief. *See generally Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992) (holding that this Board may deny a motion to remand where the ultimate relief is discretionary, if the relief would not be granted in the exercise of discretion).

Based on these considerations, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX C — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED OCTOBER 21, 2008

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
KROME SERVICE PROCESSING CENTER
MIAMI, FLORIDA

In the Matter of:

RANGEL-PEREZ, Rosendo Benito (A094 809 903),

Respondent.

IN REMOVAL PROCEEDINGS

Charges:

Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit . . . or other valid entry document required by law.

Section 212(a)(2)(6)(i)(I) of the Immigration and Nationality Act as amended in that you are an alien present in the United States without being inspected or admitted.

Section 212(a)(2)(6)(i)(I) of the Immigration and Nationality Act as amended in that you have been convicted of a crime involving moral turpitude.

Appendix C

Section 212(a)(2)(A)(ii) of the Immigration and Nationality Act as amended in that you have been convicted of a crime involving a controlled substance.

Applications:

Cancellation of Removal Section 240A(b)

On Behalf of the Respondent
Christopher W. Helt Esquire
162 West Grand Ave
Chicago, Illinois 60601

On Behalf of The DHS
Maria Lopez Esquire
Assistant Chief Counsel
Krome SPC
Miami, Florida 33194

Appendix C

DECISION OF THE IMMIGRATION JUDGE

The respondent is a native of Mexico, who entered the United States in May 1997, by crossing the border illegally. An NTA was issued, September 19, 2007 charging the respondent pursuant to sections 212(a)(7)(a)(i)(I), and 212(a)(6)(A)(i) of the Act. A I-261 was issued May 15, 2008, charging the respondent pursuant to sections 212(a)(2)(A)(i)(I), and 212(a)(2)(A)(i)(II) of the Act based on his conviction March 19, 2008 for Wholesale Delivery of Pedigree Papers, Sale Dispensing of Drugs Without a Prescription pursuant to F.S. 499.0051, and 465.015(2c). Counsel conceded all the factual allegations, and the two charges relating to his illegal entry. Counsel denied the two charges relating to criminal offense.

The Court made a finding that the while the respondent had been convicted as noted above, and was sentenced to 166 days in jail, that he was not subject to removal pursuant to sections 212(a)(2)(A)(i)(I), or 212(a)(2)(A)(i)(II) of the Act. The respondent was convicted for a regulatory offense relating to sale of prescriptions drugs. In order to be subject to removal pursuant to section 212(a)(2)(A)(i)(II) of the Act one must have been convicted for an offense relating to a narcotic drug as defined in 21 U.S.C. 102. There is no contest as to the fact that the respondent's conviction does not relate to a drug covered under this section. The respondent's offense, while serious does not render him removable as charged. Counsel for the respondent waived all forms of relief, other than Cancellation of Removal pursuant to section 240A(b) of the Act.

Appendix C

The respondent testified as did his wife, his stepson, a detective, and a doctor. The respondent testified that he is 44 years old, and is married to Ana Roque. He was married two years ago but they have lived together in Naples Florida for eight or nine years. They were unable to marry until he was divorced from his first wife who live sin Mexico. They have no children, but his wife has two children, one Maury, who is now 14 years old, and, therefore qualifies as his stepson for immigration purposes. The respondent's first wife was Rozia Del Pillar, and they had four children, all born in Mexico. The children live in Mexico. He testified that he considers Maury to be his son. Maury's father lives in Costa Rica. Maury was born in the United States, and he has known Maury since Maury was 4 years old. His wife Ana who was born in Costa Rica, and has been a citizen since 1998.

The respondent testified that he met his wife at her business, a supermarket in Naples. He was working construction at that time, having entered by crossing the border in May 1997. He has lived with Ana since 1998, and they live in a house which they purchased under her name. They do everything together, and even work together. His wife had no health problems when they met, except being a little over weight. She did, however contract cancer while married, but she is in remission, needing check-ups once a year. He is her moral support. He would help her when she was unable to walk. He would take Maury to school, and drive her around after her operations. She had gastric bypass surgery because she was morbidly obese, and lost 60

pounds. While she is recovered he still drives Maury to school. Maury goes to Seacrest School.

The respondent testified that his wife would fall asleep, anywhere, walking, watching T.V., and could not drive. She is okay today.

The respondent worked with his wife, at La Mexicana, in Fort Meyers, a store owned by his wife. He has all his meals with his wife, and her son, and he taught Maury to swim, ride a bike, and helps him with his homework. Maury likes to play the guitar. He talks to Maury about life in Mexico, and tells him that things here are better. He testified that Maury never met his four children, although Maury, and Ana testified that they did meet. He loves Maury. They take trips together going to New York, California, Atlanta, and Las Vegas. Maury was sad during his parent's divorce. Ana's life with her first husband was difficult, and Maury is much happier now. Ana was depressed, and gained weight. She lost weight after her operation, and is doing good now. If deported the family would suffer. It would be a bad situation. While he has been detained, his wife has moved in with her daughter. However, she still has her house. She still works at her business. The business is still doing well. He worked at the store 3 or 4 times a week, for maybe 4 or six hours a day.

He does not know if his wife would move to Mexico because of Maury, and her business. She would find it difficult to get a job in Mexico being over forty years old. The respondent speaks limited English, but Maury is fluent in Spanish, and English. Maury would have

difficulty in school in Mexico because he is accustom to school in the United States.

The respondent was arrested in Fort Meyers in 2007, and was accused of many things including money laundering, false lottery tickets, and trafficking in medical drugs. While he did nothing wrong he pled to the sale of prescription drugs. His wife was also arrested. While he testified that his wife was not found guilty, she did receive one year probation. He testified that all allegations were false, and that there was no evidence. He testified that during the investigation they seized 1.8 million dollars, but the money was returned to his wife. He testified that they returned one million to much, and his wife gave it back.

He testified that he sees his wife weekly while detained, and Maury does visit him. Maury is now with his father on vacation. Maury has a good relationship with his father, who lives in Costa Rica. Maury goes there during the summer. The respondent has contact with Natalie, his wife's daughter who is 31 years old, and lives with her husband. She has one child.

On cross examination he testified that they did not return all the money. The State kept $90,000. While they said he was selling medicine illegally, the business cashed checks, and did have 1.8 million dollars. He did admit that the business sold Pentrexal (Mexican name), Ampacellinin United States. He does not know anything about the sale, it was the manager of the store. He does not know if the drugs required a prescription. Drugs

were sold to people without prescription. He does know that Ana, and Maury took medicine which they bought with a prescription. They did buy medicine from a distributer, but he did not know a prescription was required. He thought it was the same as Tylenol or other over the counter drugs. The medicine was behind the counter. The manager was responsible for buying the drugs even though his wife owned the store. The manager's name was Mr. Rodriguez, but he was not arrested. The respondent testified that he did not sell the drugs. He was the maintenance man for the store, and earned $1000 per week. He did not know when he last filed income taxes, his wife takes care of this. He sends $300 per week to his children in Mexico. He made less money when he first came to the United States, and sent less money. Based on his statements it appears that in 2005 he earned $10,654 but sent $15,000 to his children in Mexico. When asked about this he said that he sends different amounts of money each month. He also testified that he sent money to his brother once. He testified that since he met Ana he has been able to send more money. He testified that did have a Workman's Compensation claim when he was hurt at work. Ana helped file the claim, he knows nothing about it. He was unable to tell the Court how much money his wife earns. They live in a house which they paid $380,000 for. He thinks that he filed a joint tax return with his wife, but he is not sure. He left four children in Mexico. He last saw pictures of them on the internet in 1997. The children range in age from 14 to 24 years of age.

The trial attorney asked him about the fact that he left his children at a young age, and he said it is difficult for a son to lose his parents. He testified that he loves his children, but he, and his ex-wife did not get along. He does not need to see the children now as the oldest is married, and even has children of his own. He has nothing in Mexico, as the children live with their grandparents, and he would have to fight their mother. He has six full brothers, four half brothers, and one sister in Mexico. He has no family in the United States other than his wife, and step-children.

He testified that he, and his wife made a trip to Texas, and his wife went to see his children. Interestingly, his wife testified that she was taking the children back to Mexico, after they had lived with them for a period of time. He stayed at a hotel in Texas while she continued to Mexico because he had no papers. The children lived in Reynosa near the border. There is a statement that Ana went to Mexico City in 2004. The respondent was stopped at a checkpoint in 2004 in Texas, and was given voluntary return, but he says he never left. The papers he received were in English, and he did not admit that he signed a statement. He admitted that he told the Border Patrol that Ana was his wife, when they were not in fact married at that time. He testified that his wife went to Reynosa, and then Mexico City, to see his children. His wife testified that the children had been with them in the United States. He does not know where she met his children, but they did go to Mexico City.

He testified that he had two arrests for Driving Without a License, and he could not get a license because he had no social security card. He did have a license in 1997, when no social security card was required. He admitted driving with a suspended license, but now says he only drove when necessary. He had testified that he drove his stepson to school, but on cross examination, he testified that Ana was with him.

The respondent testified that he did file income taxes starting in 1998, but all the returns submitted appear to have been filed in 2008.

On redirect he testified that his highest level of education was 9th grade at age 16. He never left the United States to go to Mexico. He did have insurance when driving w/o license. If he returned to Mexico, his children in Mexico would suffer, because they need his support to continue in school. He also would not be able to continue to support Maury.

The respondent's stepson Maury Roque then testified, that he is 14 years old, and that he knows the respondent for 10 years. They lived together with his mom, since about age 4. He now lives with his mom, and his 31 year old sister. They still have their house, because the 2 dogs, 11 cats, and the fish are still there. His mother does not want to sleep there, but they go everyday. He attends Seacrest County School, and is in 8th grade. His stepfather helped him with his homework, math, and science. He also attended teacher conferences. They would travel together to Orlando, Las Vegas, and California.

He testified that he had a good relationship with his stepfather, and that he never saw his parents arguing. His stepfather help his mother especially when she was hospitalized with cancer. He misses him a lot, and he has visited him while he has been detained.

On cross examination he testified that he has another brother from a different mom. His real father lives in Costa Rica, and he last saw him 2 or 3 months ago. He spends summer vacations with his real father. They sleep at his sister's house, because his mom does not want to stay at her house. He testified that he has received medicine when prescripted form a pharmacy.

He knows that his stepfather has four children in Mexico, two of them are about his age. He saw them about four years ago. He was at their house when his mom took them home to Mexico. His grades are not so good, because he feels bad about his stepfather not being there.

Natallie Pagani, his wife's daughter testified, that she lives in Fort Meyers. The respondent has been with her mom since 1998, and her mom needed someone after her divorce. He is a nice guy, and they have a good relationship. He daughter calls him grandpa.

On cross examinations he testified that she is a resident through her mother. She was raised by her grandmother, because her mother was 17 when she was born. She moved to the United States in 2000 when her grandparents died. The respondent has four children, and she met three of them at her mom's house.

Appendix C

John Miehle then testified that he is a retired police officer from California. He now lives in Fort Meyers. He gave a written statement. See exhibit #11 page 262. He testified that he saw the story about the respondent, and his wife on the news, and thought something was wrong. He was then talking to his son who knew the confidential informant. His son did construction for the respondent's wife. He testified that received all the documents in the criminal case, from the respondent's wife. His son claimed that Ana was persecuted by Sheriff Scott, and that she was being forced into bankruptcy illegally. He talked to former Sheriff Rob Shoap who was not involved in the case, but told him things were not handled right. He testified that when he saw the money that had been seized displayed on T.V., that he knew by the way it was wrapped, that it was not drug money. As part of the campaign for Sheriff between Scott, and Shoap comments were made about this case. Most of the money seized was returned to Ana with interest. In fact they paid her too much, and she returned the excess.

The respondent's wife Ana Roque testified that she was born in Costa Rica, and she lives in Naples, Florida. She has two children, ages 14, and 31. She owns a grocery store call La Mexicana. She has been married three times. The first marriage was in 1981, and lasted about one year. In 1990 she was married, and had a son. She was divorced in 1997. She then married the respondent in 2006. Her family was poor in Costa Rica, and she came to the United States at age 19. She testified that she has had serious medical problems. She

has a panic disorder since she was a child. She has a lot of fears, and a weight problem. She had weighed 300 pounds, but she now weighs 130 pounds, after having gastric bypass surgery two or three years ago. She had sleep apnea prior to this surgery. She is doing well today. She testified that she had cancer in 2004, which required surgery. She is checked every year, and there is a 10% change that it may return.

She met the respondent at work, when he came to her store. She bought the store from her ex-husband. She has lived with the respondent since 1998. They did not marry until 2006, because he was not able to obtain a divorce until 2005. He has been her companion for over 10 years, and helped raise her son. He spends time with Maury, and helps him with his homework. She has one grandchild, and the respondent has helped her daughter with the baby. They always go on family trips together. Her son, Maury considers the respondent to be a father figure. It has been difficult for him, not having the respondent around. She does not feel comfortable at her house without her husband being there. The respondent has given her life stability. He took care of her, and the business when she had cancer. She runs the business, and he has nothing to do with it.

On cross examination she testified that she had the bypass surgery in 2006, and it was elective surgery. She knew that he was illegally in the United States, and had a wife and children in Mexico when she met him. She always knew that he night be deported. She has gone to Mexico three times. In 2004 she took his children to Mexico. They had been living with them starting in 2002

for over one year. She does not know how they came into the United States, but believes they were illegal. Her husband stayed in Texas, when she went to take the children home. On the way back to Florida, they were stopped at a checkpoint, some distance from the border. Her husband was questioned, and released, but she does not know what he was told. To her knowledge he has never returned to Mexico. She testified that she pays all the bills, and that her husband did have a taxpayer I.D.

The respondent's attorney call Dr. Stephen Reich, a licensed psychologist as a witness. He testified that there are two kinds of depression, one that exists within, and one that he calls situational. Situational depression is caused by outside stimulus. This can be treated by a change in relationships. He testified that Ana had abusive relationships, and was lonely after her second divorce. She would be depressed, if her husband were deported but not suicidal. She would not respond to treatment if her husband were deported.

When questioned by the Government he stated that he met her only once for one hour forty-five minutes, and that everything he said was based on what she said to him. He went on to say, that this is how things are done. He said that he has testified in a number of cases always for the alien. However, he has refused to testify in cases where he believes that he si being mislead by the alien. He was paid $10,000 for his testimony. Based his training, and experience, he can tell when someone is conning him, and he believes the respondent has been truthful with him.

Appendix C

Counsel in his summation argues that the respondent has demonstrated that Ana and Maury, would suffer exceptional, and extremely unusual hardship if the respondent were deported to Mexico. He has been a father to Maury since he was four years old. Ana's life was not good until he came into her life. Ana has medical problems, and he has helped her cope. She would suffer depression without him, and even now she can not live in her house because he is not there. Counsel further argues that he was not actually involved with the sale of prescription drugs, and that he deserves to be granted Cancellation of Removal as a matter of discretion based on his length of residence, and family ties.

The DHS opposes the application, first arguing that he has not even established statutory eligibility in that he did not submit evidence of having resided in this country for 10 years. The DHS points out that he may have left the United States in 2004, after he was granted voluntary return by the DHS. The DHS also argues that the respondent has failed to demonstrate the required hardship to his wife and/or stepson. DHS states that there is no economic hardship as his wife is financially independent, and actually supports him. While he has a good relationship with his wife, and stepson, they presently have no serious medical problems, and the evidence does not establish that his wife or stepson would suffer exceptional or extremely unusual hardship. The DHS then argues that while respondent's conviction may technically not subject him to removal does not mean that the Court can not find him to lack Good Moral

Character pursuant to section 101(f), which allows the Court to find a lack of Good Moral Character even if one does not fall within the enumerated classes set out int hat section. Finally, the DHS points out that the respondent was not credible, and does not merit the relief as a matter of discretion.

The respondent has requested Cancellation of Removal pursuant to section 240A(b) of the Act, which requires that the respondent demonstrate that he has been physically present in the United States for a continuous period of not less than 10 years, has been a person of good moral character, has not been convicted of certain offenses, and can establish that his removal would result in exceptional and extremely unusual hardship to his spouse, parent, or child who is a citizen or resident of the United States. Pursuant to section 240A(d)(1), the period of residence ends when the NTA is issued.

The Court will find based on the testimony that the respondent entered the United States illegally in May 1997, and that he has meet the ten year residency requirement in that the NTA was issued September 19, 2007. The DHS believes that he may have left the United States in 2004, but there is no evidence of this. Pursuant to section 240A(d)(2), the respondent may still have qualified to be considered for said relief, even if he had departed the United States, if he could show that his absence was less than 90 days.

This Court has already made a finding that the respondent is not subject to removal pursuant to sections 212(a)(2)(A)(i), and 212(a)(2)(A)(ii) of the Act.

He is therefore not barred from relief pursuant to section 240A(b)(1)(C).

The respondent bears the burden of proof pursuant to section 240(c)(4)(A) of the Act. It is therefore, the respondent's burden to establish that he is a person of Good Moral Character (GMC). Section 101(f)(6) of the Act specifies certain classes of individuals who can not be found to have established GMC. The respondent does not appear to fall within any of these classes. Section 101(f)(7) states that one can not establish GMC if confined as the result of a conviction to a penal institution for more than 180 days. It appears that the respondent was incarcerated for a total of 166 days. Section 101(f) goes on to say, "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

The respondent has been convicted for Delivery of Drugs w/o prescription, and sale of contraband. He also failed to maintain pedigree papers as required by law. The respondent has violated a law in this country with respect to the sale of drugs, but not a controlled substance as defined in Title 21 section 802. While he is not subject to removal for this conviction, it is a factor to be considered in determining if he has established GMC.

The respondent has also admitted that he has been arrested on two occasions for driving without a license, and he has had his license suspended. The respondent submitted tax returns for the years 1998 to 2004, all

dated October 3, 2007, after he was placed into proceedings. This means that he had not filed his taxes each year as required. These tax returns show income of between $9000 and $10,000 per year, but he testified that he sends $300 per week to his children in Mexico. He was unable to explain this other than at one point to say that after he met Ana he was able to send more money. There is therefore a question as to his truthfulness with the Court. In *Matter of Locicero*, 11 I&N Dec. 805 (BIA 1996), the Board found that under reporting of income for purposes of avoiding a substantial tax bill precluded a finding of GMC. The *Locicero* case deals with the filing of false tax returns, and not with simply a failure to file, and the Board stated that they need not reach that issue.

Finally while the respondent testified that he had not seen his children who live in Mexico since he came to the United States, both his wife, and Maury testified that the children lived in the United States illegally, with them for over six months. His wife even testified that she drove them to Mexico, and the respondent was in the car, but he stayed in Texas. The fact that his children were in the United States was confirmed by the testimony of Natallie Pagani, Ana's daughter who testified that she met three of respondent's children at her mother's house.

The Court has a lot of concerns about the respondent's testimony, and his disregard for the laws of this country, which place in doubt respondent's GMC. However, since the respondent is not statutorily barred

from demonstrating GMC pursuant to section 101(f) of the Act, and the Court has sufficient grounds unrelated to the respondent's GMC to deny the respondent's application for relief, the Court will make no finding with regard to respondent's GMC.

The Court must now decide if the respondent has established that his removal from the United States will cause his wife, and/or stepson to suffer exceptional, and extremely unusual hardship. The respondent must demonstrate that if he is deported from the United States his qualifying relatives, "would suffer hardship that is substantially different from, or beyond that which would normally be expected from the deportation of an alien with close family members here." *Matter of Monreal*, 23 I&N Dec. 56, 65 (BIA 2001). The factors that the Court should consider include the age, health and the circumstances of the qualify relatives. *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002). The Court must weight all the factors.

In the instant case the respondent has not established any financial hardship to his wife or his stepson if he is deported. The respondent's wife owns a business, in which she earns in excess of $300,000 per year. The record contains tax returns confirming this fact. It is interesting to note that the joint tax returned filed by the respondent, and his wife for 2006 was not submitted to the IRS until June 13, 2008 after he was placed in proceedings. See Page 159 of exhibit 11. It is clear that he does not support his wife or Maury. In fact by his own testimony he has been able to send more money to his children in Mexico, since he has been living

with his wife since she pays all the bills. The respondent testified that if deported he his four children in Mexico would suffer because they need his support to continue in school. They, however, are not qualifying relatives. The instant case is on par with *Monreal*, where the Board found that hardship to family members without a qualifying relative is insufficient. In that case the Board also found that simply having a close family relationship was insufficient to establish extreme hardship. The respondent's wife testified that she is not sure if she would return to Mexico, although there does not seem to be a financial hardship if she did.

The respondent argues that his wife had cancer, although she appears to be in remission. She even testified that she is checked out once a year just to see if the cancer is coming back. Dr. Stephen Reich testified that he is a psychologist, and that he feels that Ana suffers depression because of prior abusive relationships, and that she would not respond to treatments if the respondent were deported. His report is in evidence as exhibit #10. He states in that report that neither antidepressant medicine, nor supportive psychotherapy will help her. He also testified that Maury will suffer the lose of a second parent, having already lost his real father. Dr. Reich admitted on cross examination that he reached this result based on one hour and forty-five minute conversation with her, but that he has refused to testify in cases where he believes that the individual is trying to mislead him. He believes she was truthful with him. He has testified before, and it has always been for the alien.

Appendix C

The respondent's wife in her testimony testified how they travel together, and how her husband helps Maury with his homework. The respondent's English is limited although Maury does speak Spanish. She did testify that the respondent has nothing to do with the operation of her business. She testified that Maury considers the respondent to be his father, although Maury does spend his summers in Costa Rica with his real father. Maury testified that he would miss his step-father if he were deported. Ana has another child age 31, and she testified that the respondent calls her daughter calls him grandpa.

The Court after listening to all the evidence must agree with the Government that the respondent has failed to establish that his deportation would result in exceptional and extremely unusual hardship to the qualifying relatives. They have been married for only two years, and his wife is doing well at the present time both physically, and financially. She testified that she is upset that the respondent is detained to the point of having to live with her daughter. She still goes to her house everyday. She is still able to function, even running her business successfully. The Court does not believe that this is even a close case, as any hardship is limited to the normal emotional hardship involved with separation from a spouse. This hardship is less than what is seen in most Cancellation cases in that there is absolutely no financial hardship.

Even if this respondent had established the required hardship he clearly does not merit relief as a matter of discretion. First the respondent's testimony

has not been credible. Section 240(c)(4)(c) states that the Judge may base a credibility finding on the respondent's demeanor, candor, and on any inconsistencies between his testimony, and that of his witnesses. The respondent testified that he had only seen his children on the internet after leaving Mexico children, yet his wife, and Maury testified that the children were in the United States and lived at their house in 2004. He also testified that when they were returning to Florida after his wife took the children to Mexico, that they were stopped, and he was given a voluntary return to Mexico. He says that they simply told him to leave, and he did not. For all we know he may have returned to Mexico. The respondent denies any involvement with the sale of prescription drugs, testifying that, Mr. Rodriguez, the manager was responsible. Interesting he was not even arrested, but the respondent was, and he plead guilty. The respondent testified that he sends $15,000 a year to his children in Mexico, but he earned less than that amount. He testified that he paid his income taxes, but he filed his tax returns in 2008. See exhibit #11 pages 119 to 180. The Court can not find the respondent to be credible.

The respondent does not merit Cancellation of Removal as a matter of discretion. He has been convicted of the illegal sale of prescription drugs. While respondent presented a witness John Miehle a retired police who testified that he knew something was wrong with the seizure of the money, and the allegations against the respondent, and his wife, the fact remains that they both plead guilty. It is true that most of the money was

returned, but there was still a payment of $90,000. The respondent appears to have lived in the United States with his Mexican children, while they were illegal. If we believe the respondent that he did not leave the United States in 2004, then he knowingly disregarded a order from the DHS to depart voluntarily, which he agreed to. The respondent equities include the fact that he has resided in this country for over 10 years, and that he has a wife, and stepson. However, he owns no property, his wife does, his employment is spotty, and he has done nothing to support the community. Unlike many Cancellation cases the respondent does have a criminal conviction, which shows his disregard for the laws of this country. He does not merit relief as a matter of discretion.

Accordingly the following order will be entered:

It is **ORDERED** that the respondent's application for Cancellation pursuant to section 240A(b) of the Act be **DENIED**.

It is **FURTHER ORDERED** that the be **REMOVED** from the United States to Mexico pursuant to sections 212(a)(7)(A)(i)(I), and 212(a)(6)(A)(i) of the Act.

Dated: October 21, 2008

Kenneth S. Hurewitz
Immigration Judge

Supreme Court, U.S
FILED
MAR 14 2011
OFFICE OF THE CLERK

No. 10-783

In the Supreme Court of the United States

ROSENDO BENITO RANGEL-PEREZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that, under 8 U.S.C. 1252(a)(2)(B)(i), it lacked jurisdiction to review the Board of Immigration Appeals' determination that petitioner failed to demonstrate that his removal would result in "exceptional and extremely unusual hardship" to qualifying United States citizen family members, a prerequisite to be eligible for discretionary cancellation of removal under 8 U.S.C. 1229b(b).

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In the Supreme Court of the United States

No. 10-783

ROSENDO BENITO RANGEL-PEREZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 5a-8a) and the immigration judge (Pet. App. 9a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2010. The petition for a writ of certiorari was filed on December 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is

found to be removable. 8 U.S.C. 1229b.[1] The discretion of the Attorney General to grant relief from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. See, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

To demonstrate statutory eligibility for cancellation of removal, an alien who is not a lawful permanent resident must show that he has been physically present in the United States for a continuous period of at least ten years; that he has been a person of good moral character during that period; that he has not been convicted of certain listed crimes; and (as particularly relevant here) "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1). To demonstrate "exceptional and extremely unusual hardship," the alien must show that the hardship to his qualifying relatives is "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (internal quotation marks omitted).

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[1] All references to 8 U.S.C. 1229b are to the 2006 version of the United States Code, as amended by the 2009 Supplement.

b. Since 1996, the INA has barred judicial review of specified discretionary decisions made by the Attorney General or his designees in immigration cases. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 1229b [the INA's cancellation of removal provision].

8 U.S.C. 1252(a)(2)(B)(i).

In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner is a native and citizen of Mexico. Pet. App. 11a. He entered the United States illegally in May 1997. *Ibid.* Petitioner's wife remained in Mexico with their four children. *Id.* at 12a, 15a. Petitioner settled in Naples, Florida, and began living with Ana Roque, a naturalized U.S. citizen, and Roque's son, who is also a U.S. citizen. *Ibid.* Petitioner then divorced his wife and married Roque. *Ibid.*

In September 2007, petitioner was arrested on twenty-one felony counts of illegally selling prescription drugs. Administrative Record (A.R.) 1358-1364, 1372-1377. Petitioner agreed to plead guilty and was convicted on three felony counts and sentenced to 166 days of imprisonment. A.R. 1388-1395.

United States Immigration and Customs Enforcement (ICE) initiated removal proceedings against petitioner. Petitioner was charged with being removable on four grounds: (1) as an alien present in the United States without being admitted or paroled, see 8 U.S.C. 1182(a)(6)(A)(i); (2) as an immigrant who, at the time of application for admission, is not in possession of a valid entry document, see 8 U.S.C. 1182(a)(7)(A)(i)(I); (3) as an alien who has been convicted of violating controlled substance laws, see 8 U.S.C. 1182(a)(2)(A)(i)(II); and (4) as an alien convicted of a crime involving moral turpitude, see 8 U.S.C. 1182(a)(2)(A)(i)(I). A.R. 2208-2210, 2211-2212.

Before an immigration judge (IJ), petitioner conceded that he was removable on the first two charges but denied the third and fourth charges. Pet. App. 11a. He also applied for cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 10a.

The IJ found petitioner removable and denied his application for cancellation of removal. Pet. App. 9a-30a. The IJ determined that petitioner was removable on the first two charges (regarding his illegal presence), but not the third and fourth charges (regarding his drug convictions). *Id.* at 11a, 30a. The IJ then determined that petitioner was not eligible for cancellation of removal because he failed to show that his removal would cause exceptional and extremely unusual hardship to his U.S. citizen wife or stepson, as is required by 8 U.S.C.

1229b(b)(1)(D). Pet. App. 26a-29a. The IJ noted that petitioner was required to show not only that his removal would result in hardship to qualifying family members, but that "his qualifying relatives[] 'would suffer hardship that is substantially different from, or beyond that which would normally be expected from the deportation of an alien with close family members here.'" *Id.* at 26a (quoting *In re Monreal*, 23 I. & N. Dec. at 65).

The IJ determined that petitioner's removal would pose no financial hardship to his wife or stepson. Pet. App. 26a-27a. The IJ explained that petitioner's wife "owns a business, in which she earns in excess of $300,000 per year," that "she pays all the bills," and that "[i]t is clear that [petitioner] does not support his wife or [stepson]." *Ibid.* The IJ observed that petitioner "has nothing to do with the operation of [his wife's] business" and that petitioner's removal would cause "absolutely no financial hardship" to his wife. *Id.* a 28a. Petitioner contended that his removal would cause hardship to his children in Mexico, because he would no longer be able to send them money from his job in the United States, but the IJ explained that those children are not qualifying relatives. *Id.* at 27a; see 8 U.S.C. 1229b(b)(1)(D) (removal must cause exceptional and extremely unusual hardship to a United States citizen or lawful permanent resident spouse, parent, or child).

The IJ then concluded that other factors petitioner relied on to show exceptional and extremely unusual hardship were insufficient. Pet. App. 27a-29a. The IJ found that petitioner and his wife "have been married for only two years," and his wife "is doing well at the present time both physically[] and financially." *Id.* at 28a. The IJ noted that although petitioner's wife previ-

ously had cancer, she is in remission and the only medical attention she requires is a check-up once a year. *Id.* at 27a. And the IJ determined that whatever emotional harm petitioner's wife and stepson might suffer as a result of his removal was no more than the normal emotional hardship experienced whenever an alien relative is removed. *Id.* at 28a.

In the alternative, the IJ held that even if petitioner had established the requisite hardship, and therefore was eligible for cancellation of removal, he did not merit relief as a matter of discretion. Pet. App. 28a-30a. The IJ determined that petitioner's testimony was not credible. *Id.* at 28a-29a. Giving specific examples, the IJ found that petitioner's testimony conflicted with that of his witnesses, particularly his wife and his stepson. *Id.* at 29a. The IJ also determined that petitioner's criminal convictions for illegal sale of prescription drugs "show[] his disregard for the laws of this country" and thus weigh against petitioner when considering a discretionary grant of relief. *Id.* at 29a-30a. And the IJ noted that petitioner brought his Mexican children to live with him in Florida for several months illegally, which likewise showed a disrespect for the laws of this country. *Ibid.* Finally, the IJ noted that petitioner "owns no property" in the United States, "his employment is spotty, and he has done nothing to support the community." *Id.* at 30a. The IJ concluded that petitioner's negative factors outweighed his positive equities, and the IJ therefore denied cancellation of removal as a matter of discretion.

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 5a-8a. The Board noted that petitioner did not contest the IJ's adverse credibility finding, and determined that the record sup-

ported that finding in any event. *Id.* at 7a n.2. The Board then upheld the IJ's determination that petitioner failed to demonstrate that his removal would result in exceptional and extremely unusual hardship to his wife and stepson. *Id.* at 7a-8a. The Board explained that "the record does not reflect that" any hardship petitioner's wife or stepson would experience "rises to the exceptional and extremely unusual level required for cancellation of removal." *Id.* at 7a (citing various portions of testimony). The Board found "simply no evidence * * * [that] the hardship the [petitioner's] family would suffer is distinguishable from that which would ordinarily be expected." *Id.* at 7a-8a.

4. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam order. Pet. App. 1a-4a. The court explained (*id.* at 2a) that Congress "limit[ed] [the federal courts'] jurisdiction over denials of discretionary relief in immigration proceedings" in 8 U.S.C. 1252(a)(2)(B)(i), which provides that "no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under" 8 U.S.C. 1229b, the cancellation of removal provision. The court further explained that it had previously held that the "exceptional and extremely unusual hardship" determination under 8 U.S.C. 1229b(b)(1)(D) "is a discretionary decision not subject to review." Pet. App. 3a (citing *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1221 (11th Cir. 2006)).

The court noted that although 8 U.S.C. 1252(a)(2)(D) nonetheless permits judicial review over "constitutional claims or questions of law," in this case, petitioner's claim was not a legal or constitutional one, but a challenge to the Board's discretionary determination that he had not shown the requisite hardship. Pet. App. 3a-4a.

The court reasoned that petitioner was "effectively asking [it] to reevaluate the evidence presented to the IJ" and "to review whether the [Board's] hardship decision was correct," and it concluded that petitioner's "argument is exactly the sort of abuse of discretion argument that [the court] do[es] not have jurisdiction to consider." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-16) that the court of appeals erred in holding that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(i) to review the Board's denial of the discretionary relief of cancellation of removal. The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, this case would present a poor vehicle to consider the question presented because even if there were jurisdiction, petitioner's claim would fail because he has not established the requisite hardship or good moral character and because he would be denied cancellation of removal in the exercise of discretion. Further review of petitioner's fact-bound claim is therefore unwarranted.

1. The court of appeals correctly concluded that it lacked jurisdiction to review petitioner's challenge to the Board's decision that he failed to demonstrate exceptional and extremely unusual hardship. The INA provides that no court shall have jurisdiction to review "any judgment regarding the granting of relief under section * * * 1229b * * * of this title." 8 U.S.C. 1252(a)(2)(B)(i). The relief that petitioner sought, discretionary cancellation of removal, is relief under Section 1229b, and his argument on appeal was that the Board erred in denying him that relief based on a "com-

pletely false assessment" of the underlying facts. Pet. C.A. Br. 38; see Pet. App. 3a. The court of appeals correctly concluded that it lacked jurisdiction to consider that claim under Section 1252(a)(2)(B)(i).

The court of appeals also correctly concluded that petitioner's claim does not fall within the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). As petitioner himself recognizes (Pet. 9), cancellation of removal is discretionary, and whether an applicant has met his burden of demonstrating that cancellation is justified depends on the facts of his individual case. See *In re C-V-T-*, 22 I. & N. Dec. 7, 10-12 (B.I.A. 1998); *In re Marin*, 16 I. & N. Dec. 581, 584-585 (B.I.A. 1978). That hardship determination is "precisely the discretionary determination that Congress shielded from [federal-court] review." *Meraz-Reyes* v. *Gonzales*, 436 F.3d 842, 843 (8th Cir. 2006). Petitioner's disagreement with the IJ's and Board's application of settled precedent to the facts of his case does not raise a "constitutional claim" or a "question of law." Instead, his claim is no more than a challenge to the exercise of the Board's broad discretion, and "challenges to the exercise of routine discretion * * * do not raise 'constitutional claims or questions of law.'" *De La Vega* v. *Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006).

Although petitioner attempted to recast his claim as one raising constitutional or legal questions by asserting that the Board rendered its hardship decision based on "egregiously irrational factual determinations that rise to the level of a due process violation," Pet. C.A. Br. 25, the court of appeals correctly recognized that the claim was, in fact, nothing more than a challenge to the Board's discretionary decision. There is no dispute in

this case about the operative legal standard, compare Pet. 7-9 with Pet. App. 26a; petitioner simply disagrees with the Board's conclusion, after weighing the evidence and evaluating the relevant factors, that he had not met his burden of proving that his removal would cause his wife and stepson exceptional and extremely unusual hardship. As the court of appeals explained, petitioner "[wa]s effectively asking [the court] to reevaluate the evidence" about hardship his wife would suffer if he was removed, and that "is exactly the sort of abuse of discretion argument [the courts] do not have jurisdiction to consider." Pet. App. 3a-4a. Petitioner's passing invocation of the Due Process Clause does not change the nature of his claim, which amounts on this record to nothing more than a challenge to the Board's exercise of its discretion.[2]

Indeed, if petitioner's challenge to the Board's exercise of its statutorily conferred discretion were consid-

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[2] The court of appeals correctly concluded that petitioner did not raise any "colorable constitutional issue." Pet. App. 4a. He contended that the Board relied on a "false assessment" of the facts in his case (Pet. C.A. Br. 38), and then relied upon criminal cases in which defendants had been sentenced based on false information (*id.* at 34-36). Those cases are inapposite, because neither petitioner's disagreement with the agency's weighing of the evidence nor his disagreement with the agency's adverse credibility finding make its conclusion "false." Moreover, petitioner has no due process right to a grant of discretionary cancellation of removal, and due process guarantees that a certain process be followed, not that a certain outcome be reached. *E.g., In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.) ("[P]rocedural due process does not protect litigants from any particular outcome; instead it protects litigants from arbitrary denials of rights."), cert. denied, 493 U.S. 821 (1989); see also *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) ("[A]liens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection.").

ered a "constitutional claim[] or question[] of law" under section 1252(a)(2)(D), that phrase would lose all meaning, as would section 1252(a)(2)(B)(i)'s jurisdictional bar. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), cert. denied, 548 U.S. 906 (2006); *Jarbough* v. *Attorney Gen.*, 483 F.3d 184, 189 (3d Cir. 2007) (federal courts are not bound by the label attached by party to characterize a claim and will analyze the substance of the claim to determine reviewability under section 1252(a)(2), because "[t]o do otherwise would elevate form over substance and would put a premium on artful labeling"). The court of appeals correctly held that it lacked jurisdiction over petitioner's claim.[3]

2. Contrary to petitioner's assertion (Pet. 9-16), the court of appeals' decision in this case does not conflict with decisions of other circuits. As an initial matter, the decision below is unpublished and non-precedential, and it therefore cannot give rise to the type of conflict in published decisions in the courts of appeals that would warrant this Court's review.

In any event, every court of appeals to consider the question has held that hardship determinations under

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[3] Petitioner also suggests in passing (Pet. 15-16) that the court of appeals erred by failing to address the IJ's negative credibility determination. There was no error, because that determination is only relevant to the question whether petitioner showed the requisite hardship, and the court of appeals correctly determined that it lacked jurisdiction to consider that claim. In any event, the adverse credibility finding is amply supported by the inconsistencies in petitioner's testimony. See Pet. App. 28a-29a.

8 U.S.C. 1229b are discretionary judgments made unreviewable under 8 U.S.C. 1252(a)(2)(B)(i), except to the extent that they raise colorable constitutional claims or genuine questions of law under 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Arambula-Medina* v. *Holder*, 572 F.3d 824, 828 (10th Cir. 2009), cert. denied, 130 S. Ct. 2092 (2010); *Aburto-Rocha* v. *Mukasey*, 535 F.3d 500, 502-503 (6th Cir. 2008); *Barco-Sandoval* v. *Gonzales*, 516 F.3d 35, 38-39 (2d Cir. 2008); *Zacarias-Velasquez* v. *Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Martinez* v. *United States Att'y Gen.*, 446 F.3d 1219, 1222-1223 (11th Cir. 2006); *Bencosme de Rodriguez* v. *Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005); *Obioha* v. *Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005); *Martinez-Rosas* v. *Gonzales*, 424 F.3d 926, 929-930 (9th Cir. 2005); *Rueda* v. *Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Leyva* v. *Ashcroft*, 380 F.3d 303, 305-306 (7th Cir. 2004); *Mendez-Moranchel* v. *Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003). Indeed, petitioner acknowledges that "every circuit court has held that in at least certain instances, the determination whether an alien has met his or her burden to establish the requisite hardship is considered a discretionary determination outside of a circuit court's jurisdiction to review." Pet. 9-10.

Petitioner cites cases (Pet. 10-11) in which various courts of appeals have found that certain legal and constitutional claims are reviewable. None of those decisions found a claim like petitioner's reviewable; the cited cases all address claims that are different from the one here. For example, some address whether certain crimes make an alien ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3) or (b)(1)(C), which is a legal issue that turns on the language of the relevant

statute.[4] Another case addresses whether a law could be applied retroactively,[5] a quintessentially legal issue. In other cited cases, the courts decided legal claims, but they did not specifically address jurisdiction under Section 1252(a)(2)(D).[6]

Petitioner also cites decisions in which an alien alleged that the Board used a substantively incorrect legal standard in making a hardship determination; the courts determined that those claims presented questions of law because they involved the interpretation of a statute

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[4] See *Garcia* v. *Holder*, 584 F 3d 1288, 1289 n 2 (10th Cir. 2009), *Castillo-Cruz* v. *Holder*, 581 F.3d 1154, 1157 (9th Cir 2009); *Mejia-Rodriguez* v. *Holder*, 558 F.3d 46 (1st Cir. 2009); *Rodriguez* v. *Gonzales*, 451 F.3d 60, 63-65 (2d Cir 2006), see also *Vasquez-Martinez* v. *Holder*, 564 F.3d 712, 717-719 (5th Cir. 2009) (addressing whether certain crime is an aggravated felony rendering alien ineligible for relief from removal); *Mbea* v. *Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007) (same); *Sepulveda* v. *Gonzales*, 407 F.3d 59, 63-64 (2d Cir. 2005) (addressing nondiscretionary legal issues regarding whether alien was eligible for cancellation of removal).

[5] See *Obi* v. *Holder*, 558 F 3d 609, 612 (7th Cir. 2009).

[6] Petitioner cites (Pet. 11) *Augustin* v. *Attorney Gen.*, 520 F.3d 264 (3d Cir. 2008). In that case, the court decided the legal question whether the cancellation of removal statute allows imputation of a parent's years of continuous residence to his son for purposes of establishing the requisite continuous residence, *id* at 267-272, but it did not address the scope of Section 1252(a)(2)(D)'s exception for constitutional claims and questions of law. Similarly, in *Singh* v. *Gonzales*, 451 F.3d 400 (6th Cir 2006) (cited at Pet. 11), the court of appeals addressed another statutory interpretation issue—whether the cancellation statute allows imputation of parents' fraudulent acts to their children—but did not specifically address whether Section 1252(a)(2)(D) provides jurisdiction over that claim. 451 F.3d at 405-410.

(Section 1229b).[7] Petitioner did not contend, however, that the Board used the wrong legal standard in this case. Petitioner also cites decisions in which courts found legal error because the IJ wholly failed to consider relevant evidence,[8] or the Board used a legal standard that was clearly inconsistent with its prior precedent.[9] But again, petitioner does not contend that the Board completely failed to consider relevant evidence or ignored any of its own precedent regarding the substantive requirements for proving the necessary hardship; he simply disagrees with the Board's conclusion that he failed to establish such hardship on this record.

Here, the court of appeals acknowledged that it retained jurisdiction under 8 U.S.C 1252(a)(2)(D) to review legal questions even if they relate to a cancellation-of-removal determination. Pet. App. 3a. But it concluded that the issue petitioner raised was not a question of law or a constitutional claim. The fact that some courts of appeals have found different claims to be judicially reviewable does not mean there is any disagreement in the circuits relevant here.

3. This case would in any event provide a poor vehicle to resolve the question petitioner seeks to have this Court review. Even if the court of appeals had jurisdiction to consider petitioner's challenge to the Board's hardship determination, that claim would fail, and even if petitioner demonstrated the requisite hardship, he would be ineligible for cancellation of removal because

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[7] See *Gomez-Perez* v. *Holder*, 569 F.3d 370, 371 (8th Cir. 2009); *Figueroa* v. *Mukasey*, 543 F.3d 487, 491-493 (9th Cir. 2008); *Mireles* v. *Gonzales*, 433 F.3d 965, 969 (7th Cir. 2006).

[8] *Mendez* v. *Holder*, 566 F 3d 316, 322-323 (2d Cir. 2009)

[9] *Aburto-Rocha*, 535 F 3d at 503-505.

he cannot show the requisite good moral character and would be denied cancellation of removal as a matter of discretion.

First, even if the court had jurisdiction to consider petitioner's claim, it would not overturn the Board's determination that petitioner failed to show the requisite hardship. Whether an alien has shown "exceptional and extremely unusual hardship to [his United States citizen or lawful permanent resident] spouse, parent, or child" (8 U.S.C. 1229b(b)(1)(D)) is a discretionary determination, and the IJ's underlying factual findings would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). Here, the IJ found that petitioner's wife owns a successful business, is financially independent, is able to continue managing her business without petitioner's assistance, and owns her own home. Pet. App. 26a-28a. The IJ also found that petitioner's wife, despite past health problems, is now in good health and only requires routine check-ups. *Id.* at 27a-28a. The IJ acknowledged that petitioner's removal would upset his wife and stepson, but the IJ concluded that "any hardship is limited to the normal emotional hardship involved with separation from a spouse." *Id.* at 28a. As petitioner himself acknowledged (Pet. 8), he cannot prevail on his claim of "exceptional and extremely unusual hardship" unless he shows the hardship to his qualifying relatives would be "substantially beyond the ordinary hardship that would be expected when a close family member leaves this country." *In re Monreal*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001) (internal quotation marks omitted). He has not made any such showing. See Pet. App. 7a-8a.

Even if petitioner had shown the requisite hardship, he likely would be ineligible for cancellation of removal

because he cannot show the requisite "good moral character," 8 U.S.C. 1229b(b)(1)(B). Although the IJ did not make a finding on good moral character, he expressed significant doubts about whether that standard could be met. Based on petitioner's conflicting testimony at his hearing (which led the IJ to make an adverse credibility finding, *id.* at 28a-29a) and petitioner's criminal record (which includes not only convictions for selling prescription drugs but also illegally bringing his children to this country, failing to file tax returns, and driving without a license, *id.* at 17a, 24a-25a), the IJ stated that he "ha[d] a lot of concerns about [petitioner's] testimony, and his disregard for the laws of this country." *Id.* at 25a. In light of all of these negative factors, petitioner likely could not demonstrate the requisite good moral character.

For many of the same reasons, even if petitioner were statutorily eligible for cancellation of removal, he likely would be denied that relief as a matter of discretion. Indeed, the IJ already considered the issue of whether to grant petitioner cancellation if petitioner were eligible and decided that such discretionary relief was not justified because petitioner's negative factors outweighed his positive equities. In particular, the IJ noted that petitioner's testimony was not truthful, Pet. App. 28a-29a; that petitioner's criminal convictions for illegal sale of prescription drugs "show[] his disregard for the laws of this country," *id.* at 29a-30a; that petitioner's decision to bring his Mexican children to live with him in Florida for several months illegally also showed a disrespect for United States law, *ibid.*; and that petitioner "owns no property" in the United States, "his employment is spotty, and he has done nothing to support the community," *id.* at 30a. Accordingly, in ad-

dition to the other reasons why review of the unpublished decision below is unwarranted, petitioner likely could not obtain cancellation of removal no matter how this Court resolved the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E KEENER
ROBERT N MARKLE
Attorneys

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